

**McCullough Environmental Services, Inc. and Teamsters Local Union No. 891, affiliated with the International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Case 15-CA-10972

February 28, 1992

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On January 25, 1990, the National Labor Relations Board issued its decision in this proceeding<sup>2</sup> granting the General Counsel's Motion for Summary Judgment, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive representative of employees in the appropriate unit,<sup>3</sup> and ordering the Respondent to bargain on request with the Union.

On April 9, 1991, the United States Court of Appeals for the Fifth Circuit remanded this case to the Board for reconsideration in light of *Dale Service Corp.*, 269 NLRB 924 (1984), a case that the Respondent had never cited to the Board when this case was previously before it. On August 28, 1991, the Board notified the parties that it had decided to accept the court's remand. The Respondent, the General Counsel, and the Union each filed a statement of position on remand.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On reconsideration pursuant to the court's remand and in light of the entire record in this proceeding, including the parties' statements of position, the Board reaffirms its prior Decision and Order.

The sole issue on remand involves the supervisory status of the four lead operators at the Respondent's Savannah Street facility. In the underlying Decision and Direction of Election (attached),<sup>4</sup> the Regional Di-

rector, on the evidence presented at the hearing, found that the lead operators were not supervisors. Lead operators do not have any authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward employees, or to adjust grievances. Specifically, the Regional Director found that the evidence failed to show that the lead operators' role in the disciplinary process or their assignment of work and direction of lead relief operators and shift operators was other than routine. We agree.

*Dale Service Corp.*, supra, and this case both involve the operation of wastewater treatment plants on a 24-hour-per-day, 7-day-per-week basis, and both involve the supervisory status of senior or lead operators who are responsible for the operation of the plants when managers are not present. Despite the superficial similarities, we find that *Dale Service* is factually distinguishable.

Supervisory status is one of the most common issues in representation proceedings; the Board's decisions are replete with findings of supervisory and non-supervisory status. A number of factors, principally those set forth in the definition of supervisor in Section 2(11) of the Act, are relevant. The difficulty lies in the assessment of the facts and circumstances in each case in light of the relevant factors. There are few, if any, hard and fast rules. Rather, the Board must decide in each case whether a preponderance of the evidence shows that an employer has in fact delegated supervisory authority to each employee claimed to be a supervisor. Often the Board is called on to differentiate between the exercise of independent judgment and the routine communication of instructions. In *Dale Service* the Board found on the evidence presented that the senior operators exercised independent judgment. In this case we affirm the Regional Director's decision on the evidence presented that the lead operators' instructions are routine and do not involve the use of significant discretion.

In *Dale Service* the Board found that the senior operators assigned operators to specific tasks based on their assessment of the operators' abilities. In contrast, McCullough's lead operators' assignment and direction of work is only routine. Each lead operator works with two operators—a lead relief operator and a shift operator. An operator works at one of two stations. Although there is testimony that lead operators assign operators to particular stations, it is undisputed that in practice the operators rotate shifts on a daily basis. While at their stations, operators work from an extensive checklist prepared by management. Additional tasks for each station are prepared by Chief Operator Hawthorne. The lead operator merely relays these di-

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the International Union.

<sup>2</sup> 297 NLRB 546.

<sup>3</sup> The Board took official notice of the underlying representation proceeding, Case 15-RC-7452.

<sup>4</sup> Case 15-RC-7452, issued June 16, 1989. On July 11, 1989, the Board denied the Respondent's request for review. The Union won the July 11, 1989 election by a vote of 22 to 5, with 1 nondeterminative challenged ballot. On August 1, 1989, the Regional Director issued a supplemental decision and certification of representative overruling the Respondent's objections, which alleged supervisory support of the Union by the lead operators and their participation in the election campaign. The Regional Director certified the Union as collective-bargaining representative of the unit employees. On August 30, 1989, the Board denied the Respondent's request for review. The appropriate unit is:

All operators and shift operators, mechanics and mechanics/helpers, laborers and utility employees, laboratory technicians, field inspectors, electricians, instrument men, lead operators and lead relief operators employed by the Respondent and working

at the Jackson, Mississippi wastewater treatment plant; excluding office clerical personnel, and guards, professional employees, and supervisors as defined in the Act.

rectives to the operators at the start of a shift. There is no evidence that the lead operators may on their own authority deviate from the checklists or directives. Thus, lead operators assign tasks that are predetermined by management on a rotating basis. This does not require the exercise of independent judgment.

In *Dale Service* the senior operators were, as the Board noted with emphasis, the highest ranking employees at the plant on nights and weekends and were expected to resolve problems arising on those shifts. Importantly, the senior operators had the authority to evaluate the workload, assign overtime, send employees home for lack of work, and call operators and maintenance employees into work, all without a manager's approval. Although McCullough's lead operators are the highest ranking employees present during nights and weekends, they do not possess independent authority to assign or direct the operators in their work.<sup>5</sup> Chief Operator Hawthorne is on call 24 hours a day, 7 days a week. Although lead operators resolve routine problems based on their experience, they will call Hawthorne, or Plant Manager Maines, at home if any other than a routine problem arises. If a lead operator believes an employee is needed to work overtime, as, for example, when an operator fails to report for work, he calls Hawthorne, who decides which operator, if any, will be held over.

The mere fact that the lead operators are at times the highest authority at the plant does not itself establish supervisory authority.<sup>6</sup> What is determinative is the authority that the lead operators possess, and it is the authority over employees, not the control of equipment, that is relevant. We also agree with the Regional Director's determination that the record fails to establish that the lead operators' role in evaluations or discipline requires the exercise of independent judgment. The record fails to show that their limited role has an effect on the Respondent's disciplinary system or that the Respondent relies on their reports instead of independent investigations.

In conclusion, we agree with the Regional Director that McCullough's lead operators exercise little meaningful control over the operators' performance. Accordingly, we find that the lead operators are not supervisors and shall reaffirm our original Decision and Order in this case. Other cases cited by the Respondent in its statement on remand are factually distinguishable. In *Big Rivers Electric Corp.*, 266 NLRB 380 (1983), system supervisors at an electric utility person-

ally directed employees in complex switching operations during routine maintenance and emergencies. In *Southern Indiana Gas Co. v. NLRB*, 657 F.2d 878 (7th Cir. 1981), the court found that system supervisors at an electric utility gave field employees step-by-step instructions during emergencies and directed them to remain where they were or to move to a different location. In *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980), the court found that shift operating supervisors had responsibilities to direct employees in response to nonroutine events, responsibilities that went beyond supervising the use of sophisticated equipment. In *Colorflo Decorator Products*, 228 NLRB 408 (1977), the leadwomen had independent discretion to reassign work and transfer employees to other plant areas. In each case there was evidence that the leadmen exercised independent judgment in directing the work of employees.

### ORDER

The National Labor Relations Board reaffirms the Decision and Order reported at 297 NLRB 546 (1990), and orders that the Respondent, McCullough Environmental Services, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

### APPENDIX

5. The Petitioner seeks to represent a unit consisting of all operators and shift operators, mechanics and mechanics/helpers, laborers and utility employees, laboratory technicians, field inspectors, electricians, instrument men, lead operators, and lead relief operators employed by the Employer and working at the Jackson, Mississippi waste water treatment plant, herein called the Savannah Street facility; excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act. The parties are in agreement with respect to the appropriateness of the unit, except that the Employer, contrary to the Petitioner would exclude the lead operators contending that they are supervisors within the meaning of Section 2(11). There are twenty-four (24) employees in the proposed unit, excluding the lead operators. There is no history of collective-bargaining concerning any of the employees involved herein.

The Employer, a Texas corporation, is engaged in the business of operating, maintaining, and managing water and sewerage treatment plants for various municipalities throughout the United States. The Employer has a contract with the City of Jackson, Mississippi for the operation and maintenance of Jackson's wastewater treatment facilities. The Employer's operations involve seven (7) treatment plants and eighty-two (82) pumping or lift stations. These pumping stations transfer sewerage from homes and businesses throughout Hinds, Rankin, and Madison Counties to the appropriate treatment facilities. Once the sewerage is at the appropriate treatment facility, pollutants are biologically removed to meet Environmental Protection Agency requirements before the sewerage is discharged into receiving streams.

<sup>5</sup> Lead operators may release an operator on the ground of illness. They do not otherwise give employees time off. Also they do not make the final decision regarding overtime and do not on their own call employees into work.

<sup>6</sup> See, e.g., *Esco Corp.*, 298 NLRB 837 (1990), in which the Board found that a warehouse "supervisor" was not a statutory supervisor over the warehouse employees even though he was the highest official who regularly worked at the warehouse.

The Savannah Street facility, the only facility involved in this proceeding, is the central wastewater treatment plant in the Jackson, Mississippi area. The facility occupies approximately 330 acres. The facility's treats between 46 million gallons and 120 million gallons per day. Thus far in 1988, the Savannah Street facility jobsite has treated an average of 50 million gallons per day.

The Savannah Street facility is divided into five departments: Laboratory, Maintenance, Operations, Lift Stations, and Field. Robert Maines, the Employer's Project Manager is responsible for the day-to-day operation of the Employer's business. Reporting to Maines are five (5) supervisors, each of whom are assigned to one of the departments named above. The Operations Department is the only department at issue in this proceeding.

The Operations Department is responsible for the transformation of raw sewerage into an effluent that can be discharged safely into receiving streams; and for the proper collection and disposition of the waste products and sludge in accordance with Environmental Protection Agency requirements. The Operations Department is headed by Chief Operator Andrew Hawthorne who reports directly to Maines.<sup>3</sup> Hawthorne directs the activities of Bernard Bennett, Donnie Dix, Horace Henderson and Robert Polk, the four (4) lead operators at issue herein. Also employed in this department are four (4) lead relief operators and four (4) operators.

The Savannah Street facility operates twenty-four (24) hours a day, three hundred sixty-five (365) days a year. Hawthorne works the 7:00 a.m. to 4:00 p.m. shift, Monday through Friday. The lead, lead relief, and shift operators work on a rotating basis Monday through Friday rotating weekly through the following shifts: 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to 12:00 midnight; 12:00 midnight to 8:00 a.m. On Saturdays and Sundays the lead operator, lead relief operator, and shift operator work 8:00 a.m. to 8:00 p.m. on 12-hour shifts. The operators go through this rotation every twenty-eight (28) days, working all three shifts. Each shift consists of a crew of a lead operator, a lead relief operator, and a shift operator. Typically, at the start of a shift, the lead operator coming off duty or the chief operator will meet with the lead operator going on duty. During these meetings, the on coming lead operator is briefed about the events of the day and receives any special instructions and directives from the chief operator. Subsequently, the lead operator on the crew relays this information to the lead relief and shift operator on his crew, assigns them for the shift to either the raw sewerage station or to the return sewerage and chlorination station and prepares a log reflecting the assignments made.

During a given shift, the operators work out of separate stations. The lead operator works out of the lead operator's office which is located in the main administrative headquarters building between the chief operator's office and the project manager's office. The lead relief and shift operators work at desks that are located in the work area to which they are assigned for the shift, either the raw sewerage station or the return sewerage and chlorination station. All three operators on a given shift monitor equipment and gauges, com-

plete checklists, follow directives with regard to the flow of sewerage in the plant, and perform minor maintenance of the facility. The checklists at each station map out the duties to be performed by each operator. Every two hours during the shift, the lead operator checks with the other operators on the shift. At the end of each shift, the checklists are completed by the lead relief and shift operators and turned in to the lead operator to verify that the lead relief and shift operators have checked the duties on the checklists. After the lead operator reviews the checklists, he places them in the chief operator's box, for his (chief operator's) review. From the checklists, the lead operator prepares reports and documents shift activities.

During the 4:00 p.m. to 12:00 midnight and 12:00 midnight to 8:00 a.m. shifts, there are only three employees present at the plant per shift: the lead operator, the lead relief operator, and the shift operator. The lead operators, who are generally more experienced than the lead relief and shift operators, are the highest ranking officials on duty and are responsible for the operation of the plant during these 8 hour shifts. If the lead operator is absent or unavailable for work, the lead relief operator will serve as the lead operator for the shift. The lead operator prepares logs on everything, that happens on these shifts. Any questions or problems that arise are addressed to the lead operators. If the problems are of a routine nature, the lead operator, as well as the lead relief and shift operators, may resolve it. In the event of an extraordinary problem, the lead operator must contact Chief Operator Hawthorne, who is on call twenty-four (24) hours a day, or Plant Manager Maines. It is not unusual for the lead operators to telephone Hawthorne or Maines at their respective homes. If an employee becomes ill, the lead operator may allow the operator to go home or he may contact the chief operator, who will make the final decision as to whether the employee can leave.

It is undisputed that the lead operator neither participate in the hiring process nor do they make recommendations for promotions, pay raises, or transfer employees from one shift to another. The record indicates that Plant Manager Maines is the only one with the authority to hire and fire. The chief operator has the authority to recommend employees for hire, fire, discharge, promotions, and pay raises. The chief operator also can transfer employees from one shift to another. The lead operators neither attend supervisory meetings, approve requests for vacation time, handle employee grievances, or approve employees requests for time off. If an operator is required to work overtime, the lead operator must contact the chief operator, who names the operator to be "held-over" and approves the overtime.

Lead operators have issued letters of reprimand to employees. About one year ago, lead operator Polk issued a letter of reprimand to an employee who was subsequently fired by Plant Manager Maines. The record does not indicate whether Polk recommended that the employee be fired or whether that decision was predicated on Polk's recommendation or on the independent determination by a higher authority. On a separate occasion, at Maines' request, lead operator Bennett issued a written reprimand to an employee with whom Bennett had a fight. The record establishes that Maines fired the employee although the reprimand did not contain a recommendation of action from Bennett. Also, lead operators have prepared evaluation reports on new employees at the di-

<sup>3</sup>Based on the parties stipulation and the record as a whole, I find that Andrew Hawthorne is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, he is excluded from the unit found appropriate herein.

rection of the chief operator. However, the record is insufficient to establish whether these recommendations or evaluations were relied upon or whether higher management independently investigated and made independent decisions concerning new employees.

The chief operator is the only employee in the Operations Department who is salaried. All of her operators, including lead operators, receive hourly wages. The range of pay at the Savannah Street facility is wide. On the average, lead operators receive 97 cents more per hour than lead relief operators and \$3.00 per hour more than shift operators. The record establishes that an operator's pay is not always commensurate with an employee's progression from shift operator to relief operator to lead operator. Although shift operator is the lowest classification in the Operations Department, one shift operator makes \$10.32 per hour while lead operator Bennett earns \$10.73 per hour. There is no difference in the method of pay, overtime compensation, overtime compensation and benefits between the lead operators and other operator classifications. Additionally, the lead persons in all three operator positions wear the same uniform, which consists of blue pants, a blue shirt, and a cap. The chief operator wears a white shirt, blue pants and a cap. The record indicates that supervisors in other departments also wear blue shirts, blue pants, and a cap, similar to the lead operator.

It is well established that the possession of any one of the supervisory indicia is sufficient to confer supervisory status on an employee, provided that authority is exercised with independent judgment on behalf of management and not in a routine manner. *Feralloy West Corporation*, 277 NLRB 1083 (1985); *George C. Foss Company*, 270 NLRB 232 (1984). Some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former. *Chicago Metallic Corporation*, 273 NLRB 1677 (1985); *Advanced Mining Group*, 260 NLRB 486 (1982). In the instant case, while the evidence shows that the lead operators have authority to assign employees to work stations, evaluate newly hired employees, and play a role in the disciplinary process, based on the record as a whole, I conclude that the lead operators do not possess any authority to act other than in a routine manner and only as a conduit between employees and management, and therefore they are not supervisors within the meaning of the Act. *Chicago Metallic Corporation*, supra at 1690; *Hydro Conduit Corporation*, 254 NLRB 433 (1981).

In this regard, the record is clear that the lead operators have no authority to hire, transfer, suspend, layoff, recall, promote, discharge, or reward any employees, or to adjust employee grievances. While the lead operators assign the lead relief operator and shift operator to their work stations and arrange changes in the job assignments, the record indicates that the shift and lead relief operators perform the same or similar jobs and rotate jobs daily. The work to be performed at these assigned stations is established by checklists or from management directives which indicate what has to be accomplished. There is no evidence that the lead operators have authority to vary the information on the checklists or the directives of management. They merely assign equally skilled employees to the work stations to perform the same or similar work. Such assignments require little or no skill or judgment. All things considered, the lead operators role in assigning operators is a routine one, more clerical in nature.

*Hydro Conduit Corporation*, supra at 436; *Rich's Precision Foundry, Inc.*, 262 NLRB 678 (1982).

Moreover, with respect to the direction of other employees' performance of duties, there is no showing that employees require close supervision in performing the duties to which they are assigned. Since the work is dictated by the checklists and directives issued by the chief operator or plant manager, the record fails to establish any exercise of independent judgment. *John Cuneo of Oklahoma, Inc.*, 238 NLRB 1438 (1978); *Medicine Bow Coal Company*, 217 NLRB 931 (1975). Additionally, the fact that the employees go to the lead operators whenever they have problems or questions regarding their work assignments does not vitiate this conclusion. Thus, the lead operators are more experienced employees, and it is only natural that other employees would seek their advice. However, their doing so does not confer supervisory status on the lead operators. This appears to be merely a situation whereby lesser skilled employees seek advice or instruction from more experienced and knowledgeable employees. *Chicago Metallic Corporation*, supra at 1692.

Implicit in the Employer's assertion that the lead operators are supervisors is that they are responsible for seeing that the work is completed properly. The record indicates that the lead operators check on the operators every two hours and review the completed checklists at the end of the respective shifts. However, this responsibility is not, in and of itself, sufficient to confer supervisory status. *Hydro Conduit Corporation*, supra at 438; *Loffland Brothers Company*, 243 NLRB 74 (1979); *Chicago Metallic Corporation*, supra at 1692. There is no indication in the record that the lead operators' resolution of any problem concerning this responsibility requires the exercise of independent judgment characteristic of statutory supervisory status. There is no indication that the lead operators actions in resolving such routine problems represent anything more than an exercise of work judgment rather than that of delegated authority. *Chicago Metallic Corporation*, supra at 1692; *Hydro Conduit Corporation*, supra at 438, 439. The record indicates that, if the lead operators encounter any problems which they cannot resolve in a routine manner, they are obligated to report them to Chief Operator Hawthorne or Plant Manager Maines for resolution. Even if the lead operators have the authority to correct the work of employees, there is no evidence that they can reprimand or otherwise discipline them to an extent which might significantly affect the employees' job status or work to their detriment. Thus, the lead operators exercise little meaningful control over their co-worker's performance. *Chicago Metallic Corporation*, supra at 1692; *Ahrens Aircraft, Inc.*, 259 NLRB 839 (1981).

The evidence shows that, on two occasions, the lead operators have issued written reprimands to employees. One reprimand was issued because an employee was involved in a fight with a lead operator and was issued only at the request of Plant Manager Maines. No recommended cause of action was placed on this written reprimand. The record does not indicate the exact reason the second reprimand was issued. The record fails to establish the effects of these reprimands within the Employer's disciplinary system or whether the discipline administered with respect to these incidents was based on the Employer's reliance on the reprimands or on an independent determination of the matter by admitted super-

visors. Consequently, the record fails to establish that the lead operators' role in the disciplinary process required the exercise of independent judgment. *Injected Rubber Products Corp.*, 258 NLRB 687 (1981); *Hydro Conduit Corporation*, supra at 437; *Chicago Metallic Corporation*, supra at 1693; *Commercial Movers, Inc.*, 240 NLRB 288 (1979).

While it is the lead operator who determines when an employee is needed to work overtime, it is Chief Operator Hawthorne who makes the determination as to whether overtime is to be performed and which employees will work overtime. There is no basis in the record for concluding that the lead operators exercise independent judgment in selecting or in effectively recommending the selection of employees who are to be assigned to perform overtime work. The Employer asserts that the lead operators have authority to grant employee requests to leave work early. However, the record indicates that the lead operator normally allow a sick employee to leave early after consulting Chief Operator Hawthorne. Accordingly, the lead operators authority in this regard, if any, is not supervisory.

Finally, it was noted that at least one shift operator receives more per hour than a lead operator; that the lead operator, the lead relief operator, and the shift operator are paid

on an hourly basis, receive the same benefits, punch a time clock; and there is no record evidence that the lead operators ever recommended changes in the methods or procedures and/or cost reduction possibilities or that they had any input in the planning and controlling of the Employer's Operations' Department. *Chicago Metallic Corporation*, supra at 1690.

Based on the foregoing and the record as a whole, I find that the lead operators are not supervisors as defined in the Act, and should therefore be included in the appropriate unit.

I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All operators and shift operators, mechanics and mechanics/helpers, laborers and utility employees, laboratory technicians, field inspectors, electricians, instrument men, lead operators and lead relief operators employed by the Employer and working at the Jackson, Mississippi wastewater treatment plant; excluding office clerical personnel, and guards, professional employees, and supervisors as defined in the Act.